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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TOMAS MEDINA,

Plaintiff,

v.

19 Civ. 9412 (AJN) (OTW)

CITY OF NEW YORK, et al.,

Defendants.

Pretrial Conference
(Via Teleconference)

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New York, N.Y.
November 10, 2020
10:38 a.m.

Before:

HON. ONA T. WANG,

Magistrate Judge

APPEARANCES

COVINGTON & BURLING LLP

Attorneys for Plaintiff

BY: ISHITA KALA, ESQ.

THE LEGAL AID SOCIETY

SPECIAL LITIGATION UNIT

Attorneys for Plaintiff

BY: MOLLY GRIFFARD, ESQ.

W. ALEXANDER LESMAN, ESQ.

NEW YORK CITY LAW DEPARTMENT

OFFICE OF THE CORPORATION COUNSEL

For Defendants

BY: PETER W. BROCKER, Assistant Corporation Counsel

JOSEPH P. ZANGRILLI, Assistant Corporation Counsel

KARASYK & MOSCHELLA, LLP

Attorneys for Defendant Fabio Nunez

BY: JAMES M. MOSCHELLA, ESQ.

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(Case called)

THE DEPUTY CLERK: Please state your appearances.

MS. KALA: For the plaintiff -- good morning, your Honor. For the plaintiff, you have Ishita Kala from Covington & Burling, and my colleagues Alexander Lesman and Molly Griffard from Legal Aid.

MR. BROCKER: Good morning, your Honor. For city defendants, this is Peter Brocker from the New York City Law Department.

MR. MOSCHELLA: And good morning, your Honor. Appearing for co-defendant Fabio Nuñez, James Moschella.

MR. ZANGRILLI: Good morning, your Honor. This is Joe Zangrilli, also appearing for the city defendants.

THE COURT: All right. Good morning, everyone. This is Judge Wang. I decided to stay on mute until everybody finished their appearances rather than muddle with, you know, going on and off mute.

We're here for a status conference. We also have a court reporter on the line.

We are proceeding by telephone due to the COVID-19 pandemic. This is a public line. It should be treated like my virtual courtroom. I expect the same decorum on the line that I expect in my courtroom. The parties should also expect that members of the press or the public may be on the line on a listen only basis.

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1 Because we have a court reporter on the line and she
2 is on the telephone, please stay on mute when you're not
3 talking. Please say your name when you start speaking. This
4 will help with the transcript. And of course, please don't
5 interrupt each other.

6 And finally, recording or rebroadcasting by anyone
7 else on this line is strictly prohibited.

8 All right. So we're here for a status conference. I
9 understand that I also asked you for briefing on the protective
10 order, and we'll get to that second.

11 I think first I'd like to hear a little bit about the
12 status of discovery. What have you done so far? What do you
13 still have left to do? And I'm telling you, I'm more than
14 likely going to give you the extension you're asking for. I
15 just want to know where you are and what your plan is for
16 getting done by February 17th. Okay? Thanks.

17 MS. KALA: Certainly, your Honor. This is Ishita Kala
18 from plaintiff's side.

19 I can begin with what we've done on discovery. So
20 we've served our first set of interrogatories and requests for
21 production. We served those on July 8th. And we've also
22 served one additional interrogatory and a second set of
23 requests for production. That was on October 22nd. We have
24 received some -- and that was on city defendants. I'll get to
25 defendant Nuñez in a moment.

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1 We've received responses and objections to our first
2 set of interrogatories and requests for production. As we
3 noted in our letter, we have gone back and forth with city
4 defendants about a number of deficiencies in that first set of
5 production, but we were able to resolve our differences at a
6 meet-and-confer last week, so we're now just waiting for the
7 production of the outstanding responsive documents for the
8 first set of interrogatories and requests for production, and
9 we expect city defendants' responses at the end of this month
10 to our second set of requests for production and the one
11 additional interrogatory. Once we have that discovery, we can
12 proceed with depositions.

13 Right now we're still missing some key categories of
14 discovery that are preventing us from conducting depositions.
15 That includes incident reports about the incident in question,
16 the Internal Affairs Bureau documentation, training records and
17 materials, and some key NYPD policies that affect the conduct
18 that happened here.

19 And I can also speak briefly about where things stand
20 with defendant Nuñez's production. We served our first set of
21 interrogatories and requests for production on August 21, 2020,
22 and we just on Friday received responsive documents -- and
23 yesterday received responsive documents to our interrogatories,
24 so we'll need some time to process those materials before we
25 can move forward there.

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1 THE COURT: All right. Thank you.

2 So as for Mr. Nuñez, defendant Nuñez, I understand
3 that you will need to process what you just received, but short
4 of, you know, resolving deficiencies or seeking additional
5 documents as a result of that, is the only thing left then for
6 Mr. Nuñez then is his deposition?

7 MS. KALA: Yeah, that's correct, your Honor. We may
8 need to serve additional discovery requests, just based on what
9 we've received. Our next step there would be a deposition.
10 However, I should caveat that by noting a deposition of
11 defendant Nuñez will only be effective if we do have some of
12 the documents I mentioned from corporation counsel related to
13 these policies that were in effect.

14 THE COURT: Of course. Understood. I'm just trying
15 to get a sense of how the pieces fit together and what steps
16 need to be completed before we get to depositions and so on.

17 Okay. All right. So let's hear from defendants. I
18 mean, I'm assuming that there isn't a whole lot of discovery
19 that you're seeking from the plaintiff. Is that right?

20 MR. BROCKER: Good morning, your Honor. This is Peter
21 Brocker.

22 There are some outstanding items that we are going to
23 seek -- that we are seeking from plaintiff. Nothing that I
24 think will slow down discovery in any kind of a meaningful way,
25 and we are -- I'm fully confident that the parties can resolve

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1 those areas of dispute without involving the Court.

2 In terms of the documents that the city is in the
3 process of obtaining and disclosing to plaintiff, this case has
4 had sort of an unusual life in the sense that the timing of the
5 case sort of follows timing of 2020 in general, and the ability
6 of the city and the NYPD to respond to discovery requests has
7 been diminished for a good chunk of the year, which is why
8 discovery has proceeded a little bit more slowly than may have
9 ordinarily been the course. So essentially, in the view of the
10 city defendants, we are actually fairly close to wrapping up
11 document discovery. The hope is that the outstanding items can
12 be obtained in the next 30 or so days, and that would give us
13 the remainder of the requested extension of discovery to
14 complete depositions.

15 THE COURT: All right. Great. So it sounds like
16 you're on track and you will be on track with the extension.
17 So I am going to extend discovery until February 17th.

18 Okay. And I know that I've had both Mr. Brocker and
19 Mr. Zangrilli on other cases with the city, so I hold them to a
20 pretty high standard in terms of working well with opposing
21 counsel and getting discovery done in a timely fashion, so I
22 expect that will continue, and I'll hear from you all if it's
23 not.

24 All right. Let's move on. Is there anything else we
25 need to deal with in discovery before we talk about the

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1 protective order issue?

2 MS. KALA: No, your Honor.

3 MR. BROCKER: Not from city defendants, your Honor.

4 THE COURT: Okay. All right. So let's talk about the
5 protective order. I don't want to treat this like an oral
6 argument, because I did have you already brief the issue. I
7 think what I'm trying to understand is what the concern is with
8 letting the city continue to provisionally designate documents
9 confidential and then, if an issue arises with particular
10 documents, that you then have, you know, your meet-and-confer
11 process about those particular documents and try to reach some
12 agreement. I mean, I think part of the problem, when I look at
13 this, is that given the state of the law and how it is
14 changing, that you're essentially asking for an advisory
15 opinion from the Court for a blanket ruling on documents that
16 we haven't seen yet. We haven't seen what you're getting from
17 FOIL and whether any documents that you get from FOIL are going
18 to be redacted or not. And allowing the city to continue to
19 provisionally designate certain documents and then engage in a
20 meet-and-confer to try to resolve these issues before bringing
21 them to the Court allows us to fine-tune the issue a little bit
22 more. As I said earlier, with counsel on both sides, I would
23 expect motions to be made in good faith. So I guess I'm having
24 a little bit of difficulty in understanding what the issue is
25 right now and why there is this inability to agree.

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1 So anybody can start. And just frame the issue for
2 me. Explain to me why we can't continue with provisional
3 designations of confidentiality and then we talk about
4 particular documents if it turns out that you need to use them
5 in some way.

6 MS. GRIFFARD: Yes, your Honor. This is Molly
7 Griffard for the plaintiff.

8 What defendants are seeking is a blanket
9 confidentiality order which designates all police disciplinary
10 records as confidential, and why plaintiff is opposed to this
11 is that, well, first of all, the burden for seeking a
12 confidentiality order is on the moving party, and based on the
13 city's own position in *Uniform Fire*, there is no justification
14 for these records to be deemed confidential. The position
15 they're taking before your Honor is contradictory to the
16 position they've taken before Judge Failla and the Second
17 Circuit.

18 THE COURT: Okay. Ms. Griffard?

19 MS. GRIFFARD: Yes.

20 THE COURT: I usually try not to interrupt, but I said
21 at the beginning of this, I'm not here for oral argument. I
22 don't want to hear oral argument. I want to hear in this case,
23 what is the issue, because I already said I'm not going to give
24 the city a blanket confidentiality order, okay? I am asking
25 why we can't proceed with allowing the city to provisionally

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1 designate certain documents confidential but they're going to
2 have to consider the documents and the substance in the
3 documents, why we can't proceed that way. Because just as
4 you're saying that the city is asking for a blanket
5 confidentiality order, the city's response to that seems to be
6 that you're asking for a blanket "not confidential ever," where
7 it seems like the issue might be what are you able to get via
8 FOIL, and we haven't seen in this case what you're able to get
9 through FOIL.

10 MS. GRIFFARD: Yes, your Honor. The issue for us is
11 that the city should have a good -- we would consent, and we do
12 consent. We have discussed this in meet-and-confers. But we
13 have a good faith catchall clause in the existing
14 confidentiality order, and if the defendants take a
15 record-by-record approach and have a good faith basis for
16 designating a record as confidential, that is acceptable to us.
17 What we're not okay with is a blanket confidentiality order,
18 and we would also reject that, you know, the very arguments
19 that they make about -- there's no harm to privacy, there's no
20 risk of, you know, officer safety issues, etc., that they're
21 making in *Uniform Fire*, and that is, you know, clearly part of
22 the legislative intent of repealing 50-h, that they can't then
23 designate records as confidential using these sort of defunct
24 arguments that they used to rely on, because that is so clearly
25 no longer the state of the law. It's pretty clear those

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1 records would be accessible under FOIL, and in fact the city
2 itself is arguing for that.

3 I'm not sure if that makes sense. But we would be
4 okay with individual records being designated confidential if
5 there is a good faith basis.

6 THE COURT: Right. And I guess the reason why I
7 interrupted you is, are there particular records that have been
8 produced already that you believe the city has designated
9 confidential without a good faith basis?

10 MS. GRIFFARD: I believe at the moment the city has
11 designated all disciplinary records as provisionally
12 confidential, and yes, we would object to that continued
13 designation, as some of them clearly, you know, even fall
14 outside of the administrative stay in *Uniform Fire* and it's
15 very clear that those are now publicly accessible records.

16 THE COURT: Okay. How many records are we talking
17 about to date? If you have a better sense in terms of pages,
18 that would be helpful too, because I'm about to give the city
19 some homework.

20 MS. GRIFFARD: Your Honor, I would have to go back
21 through the files to get a more accurate number. I'm not sure
22 if any of my co-counsel know offhand or if the city knows how
23 many disciplinary records they've produced. I apologize.

24 MS. KALA: Your Honor, this is Ishita Kala. I do not
25 know the number of records offhand, but I want to note that we

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1 have still not received quite a lot of disciplinary records and
2 are expecting to receive them and, you know, for those records,
3 we don't know how the city is going to designate them with
4 regards to confidentiality.

5 MR. BROCKER: If I may, your Honor. This is Peter
6 Brocker.

7 THE COURT: Go ahead.

8 MR. BROCKER: So in terms of the confidential records
9 disclosed to this point, the CCRB investigative file in this
10 incident was disclosed provisionally confidential, as well as
11 the sort of summary, summaries of the defendant officers'
12 discipline -- which are the CCRB history, Internal Affairs,
13 résumé, as it's called, in the central personnel index -- would
14 have all been disclosed confidential. I believe the CCRB file
15 was disclosed. I'm not sure -- I apologize, your Honor. If I
16 can just ask, are you looking for like the number of pages
17 or -- I'm not entirely sure what information would be helpful
18 right now.

19 THE COURT: Okay. So Mr. Brocker, since you're in the
20 hot seat now, the homework I was thinking about giving you all
21 is, as for what has been provisionally designated confidential,
22 maybe you need to prepare a log for me to review. Because it
23 sounds like you're arguing over, you know, whether these should
24 be all not confidential or all provisionally confidential. I
25 guess my question is, at this point in discovery, how does it

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1 matter? Does it actually hamper the plaintiff's ability to
2 proceed in discovery if these records are provisionally
3 designated confidential or does it come up later, say, when
4 you're making a motion for summary judgment or something and
5 you want to include records? That's number one.

6 And then number two for the city is, for the
7 additional disciplinary records or other information that you
8 could conceive of designating provisionally confidential, I
9 want to know what that volume is, because I'm trying to frame a
10 way where documents can be produced on a factor basis for
11 plaintiffs, right? You get as much discovery over to the
12 plaintiffs as you can, and then if there is a problem with the
13 confidential designations because it's hampering in some way
14 the plaintiff's ability to use them, then I want to know about
15 it, but right now I guess I'm just trying to understand how
16 that affects your litigation of the case between now and
17 February.

18 (Outside interruption)

19 (Discussion off the record)

20 MR. BROCKER: I apologize, your Honor. This is Peter
21 Brocker again.

22 So it seems to defendants that the earliest that the
23 confidentiality designation could impact the flow of the
24 litigation would potentially be in depositions, where, if
25 plaintiffs wanted to use confidential documents, they may have

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1 to deem the portion of the testimony confidential as well that
2 relates to those documents.

3 In terms of the forthcoming documents in discovery
4 that would likely be deemed confidential, city defendants are
5 in the process of finalizing for disclosure the Internal
6 Affairs investigation of this incident, which would be
7 designated preliminarily confidential, similar to the CCRB
8 file. If there are individual pieces of the file that
9 plaintiffs think should not be designated confidential -- and I
10 think there are areas for compromise here -- city defendants
11 are open to having that conversation. Obviously the core of
12 the files, city defendants are going to consider confidential,
13 but very often the entire file is marked confidential for I
14 think to some extent expediency's sake, to get documents
15 disclosed as quickly as possible, but also because the bundle
16 itself, the file itself is what is treated as confidential.
17 And obviously I can't speak for what plaintiff's counsel
18 believe the impacts would be on how they proceed with their
19 case if these files are designated as confidential, but beyond
20 the IAB file, which should be disclosed shortly, I think the
21 only other records which would be confidential would be
22 personnel related, personnel evaluations for the defendants,
23 and that would pretty much constitute the entire universe, as I
24 understand it, of the confidential material that relate to the
25 motion at hand.

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1 THE COURT: All right. And so I generally don't have
2 a problem with what Mr. Brocker is saying, except that I don't
3 think that the whole burden should be on the plaintiff to say,
4 you know, we plan to be using these in depositions and
5 therefore we prefer they not be designated confidential, or
6 parts of the file; yet on the other hand, plaintiffs are
7 supposed to be reviewing all of this and determining what you
8 really need. I am not certain that this is what we need to be
9 arguing about right now when we are really trying to get
10 discovery done. I mean, you're getting the documents; you're
11 just getting them with a designation you're not happy about.

12 And Mr. Brocker, how large is the file? I mean, how
13 many documents or pages need to be reviewed?

14 MR. BROCKER: So I believe the CCRB file and the
15 Internal Affairs investigative file both run several hundred
16 pages, somewhere between 5 and 600. So cumulatively, I would
17 say, with the evaluations and some of the personnel records
18 that have been previously disclosed, we're probably talking in
19 the neighborhood of 1500 pages of documents total which will
20 likely be deemed confidential. Maybe slightly more, but not by
21 much.

22 THE COURT: Okay. And this is of the documents that
23 have already been produced or does this include the documents
24 that you're working on producing?

25 MR. BROCKER: No. That would include the documents

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1 that we're working on producing as well.

2 THE COURT: Okay. All right. And when do you think
3 you'll be finished with the production again? I know you said
4 it's forthcoming.

5 MR. BROCKER: Yes. So the city has switched to a
6 rolling basis for production because of some of the
7 difficulties that we've been running into in obtaining
8 documents. So the Internal Affairs file should be disclosed by
9 the end of this week, I anticipate. After that we have I
10 believe some training records which should be accessible to
11 Mr. Zangrilli and I hopefully Thursday or Friday, which would
12 be the next batch that we would try and disclose to plaintiffs
13 after that. We've been working with plaintiffs, trying to
14 identify the most important documents they need now to be able
15 to move on to the next step and getting those as quickly as
16 possible. Essentially the big hurdle at this point is sort of
17 the large percent -- the large number of NYPD officers who have
18 retired in recent weeks has taken its toll on -- the unit that
19 we liaise with for the NYPD to obtain documents has lost
20 several individuals, and it was not a large unit to begin with,
21 and because of the hiring freeze the city's under, nobody's
22 been able to replace them. So we're sort of asking a lot of
23 the few people that remain in that role. So we're all working
24 with them to try and get documents as quickly as possible,
25 but -- ordinarily I think I would be able to give you a much

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1 more definite timeline as to when we would expect things. At
2 this point I can say we have the Internal Affairs file. It's
3 being prepared to be disclosed. And I know that there is a
4 large trove of training documents and materials which go out
5 next. Beyond that, I'm not sure what will follow. But I'm
6 optimistic that in the next 30 days we can get the vast
7 majority of the outstanding documents to plaintiffs.

8 THE COURT: All right. So here's what we'll do then.
9 Let's set a date for a joint status letter on the
10 confidentiality designations issue.

11 Wow, we're bumping up into the winter holidays.

12 And I do want you all to be able to get your
13 depositions done by February 17th if at all possible.

14 Again, I mean, I think it goes without saying, because
15 my individual practices still have my COVID warnings since
16 March, but, you know, I do want the parties to try to do
17 depositions remotely, conduct depositions remotely or virtually
18 wherever possible. I expect everybody to work together on that
19 and not to, you know, withhold their witness for deposition or
20 insist on anything in person. I understand that most times an
21 in-person deposition would be preferable, but these are not
22 most times. But if COVID precautions end up being an issue or
23 if the pandemic ends up causing difficulties with either
24 scheduling or agreement on how to take those depositions, I
25 would rather hear about it sooner rather than later, okay, so

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1 that we can work something out.

2 Now as to these documents, I would like the plaintiff
3 to get the production and the forthcoming production with the
4 city's good faith, you know, designations, understanding that,
5 you know, a provisional blanket designation might get you the
6 documents sooner so that you can review them and then you
7 should have a robust meet-and-confer about this. I have
8 overseen many cases where even the portions of the deposition
9 were provisionally designated confidential and then later the
10 designation was removed, okay? I think for the plaintiffs to
11 win at this point, if you're suggesting that the designations
12 have been applied in bad faith or not in good faith, I'm not
13 seeing that yet, okay? It doesn't mean that I would not see it
14 later, but I think given the tradeoff between trying to get
15 documents, trying to get the information to the plaintiffs in a
16 timely fashion and on a rolling basis, you know, this may be a
17 tradeoff, that you just table this dispute until you have an
18 actual ripe dispute over particular documents. It may come to,
19 at the end of the day, that both parties would prefer that
20 certain things not be designated confidential, okay? But it's
21 sort of like, be careful of what you ask for, because if you
22 want the city to do a more robust analysis in the first
23 instance, given the situation right now in terms of staffing
24 ability and the majority of people still working remotely, that
25 can end up delaying what you ultimately get. And then you

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1 might still be making the same motions about particular
2 documents that you think shouldn't have been designated
3 confidential. But right now I'm not seeing the prejudice to
4 the point where I need to be deciding something in a vacuum
5 without the benefit of you all having this robust
6 meet-and-confer, okay? I think there is plenty to work on on
7 this case to finish the actual fact discovery and to actually
8 litigate it, all right?

9 All right. So what else do we need to address right
10 now? So I guess your options are a joint status letter on
11 where you are with the confidentiality issues, either
12 December 11th or December 18th.

13 MS. KALA: Either of those dates work for plaintiff,
14 your Honor.

15 THE COURT: Okay. Mr. Brocker?

16 MR. BROCKER: Yes, your Honor. Defendants would
17 prefer December 11th. December 18th I will not be available.

18 THE COURT: Okay. December 11th it is for a joint
19 status letter. I mean, my hope is that even if all of the
20 documents aren't produced, based on Mr. Brocker's
21 representation that the CCRB file and the Internal Affairs file
22 that is forthcoming, which sounds like the bulk of the issues,
23 you may actually find that you're not in too much disagreement
24 or that you're able to work out most of the issues. Okay?

25 All right. So December 11th for the status letter on

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1 confidentiality issues. If at that point there are other
2 issues that come up, put those in the letter too, just to give
3 me a heads up, and then we can see what to do about that.

4 Okay?

5 All right. Mr. Brocker, if there is reason to
6 congratulate you because of your unavailability or impending
7 unavailability, those are given right now. Okay?

8 MR. BROCKER: Thank you, your Honor.

9 THE COURT: All right. Anything else from plaintiff's
10 counsel?

11 MS. KALA: This is Ishita Kala. No, your Honor.
12 Nothing further from plaintiff.

13 THE COURT: Okay. What about the defendants?

14 MR. BROCKER: Nothing for the city defendants, your
15 Honor.

16 MR. MOSCHELLA: Nor for Nuñez. Thank you, your Honor.

17 THE COURT: All right. Thank you. I am requesting
18 that the parties order the transcript and share the cost. And
19 I'd like it to be split this way: 50 percent by the plaintiffs
20 and 25 percent each by the city and by Mr. Nuñez. All right?

21 And I apologize for my 11:00 who is waiting. We have
22 to start a little bit late.

23 All right. So 19 Civ. 9412, we are adjourned. Thank
24 you.

25 ALL COUNSEL: Thank you.
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